72

No. 07-313

FILED
NOV 7 - 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

MICHAEL A. COX,
Attorney General of the State of Michigan,

Petitioner,

—v.—

NORTHLAND FAMILY PLANNING CLINIC, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

MICHAEL J. STEINBERG
KARY L. MOSS
American Civil Liberties
Fund of Michigan
60 West Hancock Street
Detroit, Michigan 48201
(313) 578-6814

EVE C. GARTNER
ROGER K. EVANS
Planned Parenthood
Federation of America
434 West 33rd Street
New York, New York 10001
(212) 541-7800

BRIGITTE AMIRI
Counsel of Record
TALCOTT CAMP
LOUISE MELLING
ALEXA R. KOLBI-MOLINAS
STEVEN R. SHAPIRO
American Civil Liberties
Union Foundation
125 Broad Street, 18th Floor
New York, New York 10004
(212) 549-2633

(*Counsel for Respondents continued on inside cover*)

JANET CREPPS
Center for Reproductive Rights
120 Wall Street, 14th Floor
New York, New York 10005
(917) 637-3600

DAVID A. NACHT, P.C.
201 South Main, Suite 1000
Ann Arbor, Michigan 48104
(734) 663-7550

Counsel for Respondents

QUESTION PRESENTED

Whether the Sixth Circuit abused its discretion in refusing to certify a question to the Michigan Supreme Court about the interpretation of Michigan's Legal Birth Definition Act after determining that it was not reasonably susceptible to a narrowing construction?

RULE 29.6 DISCLOSURE

None of the Respondents in this action has a parent corporation or any stock owned by publicly held corporations.

TABLE OF CONTENTS

QUESTION PRESENTED i

RULE 29.6 DISCLOSURE ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 4

I. There Is No Conflict or Confusion in the Lower Courts About the Standard For Certifying Questions to State Supreme Courts. 5

II. The Sixth Circuit Properly Exercised Its Discretion in Declining Certification Based on Its Determination That the Act Is Not Reasonably Susceptible to a Narrowing Construction. 6

III. Whether the Sixth Circuit Abused Its Discretion By Refusing to Certify This Case to the State Supreme Court Does Not Raise an Important Federal Question. 14

CONCLUSION 17

TABLE OF AUTHORITIES

CASES

Almendarez-Torres v. United States, 523 U.S. 224 (1998) 7

American Civil Liberties Union of Nevada v. Heller, 378 F.3d 979 (9th Cir. 2004) 5-6

Arizonans for Official English v. Arizona, 520 U.S. 43 (1997) 4, 7

Ayotte v. Planned Parenthood of Northern New England, 546 U.S. 320 (2006) 13

City of Houston, Texas v. Hill, 482 U.S. 451 (1987) 5, 7

DiBenedetto v. West Shore Hospital, 605 N.W.2d 300 (Mich. 2000) 12, 14

Dorman v. Satti, 862 F.2d 432 (2d Cir. 1988) 6

Elkins v. Moreno, 435 U.S. 647 (1978) 7

Fiore v. White, 528 U.S. 23 (1999) 7

Frank W. Lynch & Co. v. Flex Technologies, Inc., 624 N.W.2d 180 (Mich. 2001) 11

Gonzales v. Carhart, 127 S. Ct. 1610 (2007) 6-7, 8, 9

Grant v. Meyer, 828 F.2d 1446 (10th Cir. 1987) 6

In re Certified Question (Jewell Theatre Corp.),
359 N.W.2d 513 (Mich. 1984) 16

In re Certified Questions (Melson v. Prime Insurance Syndicate),
696 N.W.2d 687 (Mich. 2005) 15

Knox v. Eli Lilly and Co.,
592 F.2d 317 (6th Cir. 1979)..... 15

Kusper v. Pontikes, 414 U.S. 51 (1973) 5

Lehman Brothers v. Schein, 416 U.S. 386 (1974) 5

People v. Adams, 205 N.W.2d 415 (Mich. 1973) 13

People v. Bricker,
208 N.W.2d 172 (Mich. 1973) 12, 13

Planned Parenthood of Central New Jersey v. Farmer, 220 F.3d 127 (3d Cir. 2000)..... 6

Planned Parenthood, Sioux Falls Clinic v. Miller,
63 F.3d 1452 (8th Cir. 1995)..... 6

Stenberg v. Carhart, 530 U.S. 914 (2000) .....*passim*

Union Planters Bank, N.A. v. New York,
436 F.3d 1305 (11th Cir. 2006)..... 5

United States v. American Trucking Associations,
310 U.S. 534 (1940)..... 11

Women's Medical Professional Corp. v. Taft,
353 F.3d 436 (6th Cir. 2003)..... 12

STATUTES

18 U.S.C. § 1531(b)(1)(B) (2000) 9

Legal Birth Definition Act,
Mich. Comp. Laws §§ 333.1081-333.1085 ..... *passim*

OTHER AUTHORITIES

17A Wright, Miller, Cooper and Amar,
Federal Practice and Procedure:
Jurisdiction 3d § 4248 (2007) 6, 14

M. Bryan Schneider, *"But Answer Came There None": The Michigan Supreme Court and the Certified Question of State Law,*
41 Wayne L. Rev. 273 (1995) 15

Mich. Journal of the Senate 92-40
(May 1, 2003) 11

Mich. Journal of the Senate 92-58
(June 9, 2004) 10

Mich. Op. Att'y Gen. No. 7174 (2005) 2, 10

Senate Fiscal Agency Analysis for Enrolled
Senate Bill 395 11

RULES

Sup. Ct. R. 10(a) 4

Sup. Ct. R. 10(c) 4

Mich. Ct. R. 7.305 15

STATEMENT OF THE CASE

This case involves a challenge to Michigan Public Act 135 of 2004, the "Legal Birth Definition Act" (codified at Mich. Comp. Laws §§ 333.1081-333.1085) ("the Act"). Both courts below found that the Act would broadly prohibit the most commonly used methods of abortion in the first and second trimesters. The Act does so not by banning abortion directly, but by equating a "perinate" with a legally born person "for all purposes under the law." § 333.1083(1); Pet. App. 71a. The Act then defines a "perinate" as a "live human being at any point after which *any* anatomical part of the human being is known to have passed beyond the plane of the vaginal introitus," i.e., the vaginal opening, "until the point of complete expulsion or extraction from the mother's body." § 333.1085(d) (emphasis added); Pet. App. 72a (emphasis added). The Act specifies no penalties for violating its terms, but it has the effect of subjecting physicians to criminal, civil, and administrative liability. *See* § 333.1083(2); Pet. App. 71a. Accordingly, physicians who perform the most common first- and second-trimester abortions would face prosecution for all acts and omissions they take regarding "perinates." § 333.1083(1); Pet. App. 71a.

The Act was passed in June 2004, and scheduled to take effect on March 30, 2005. Pet. App. 37a. On March 1, 2005, Respondents filed suit alleging that the Act was unconstitutional because it banned the most common abortion methods, thereby creating an undue burden. Respondents also alleged that the health and life exceptions were constitutionally inadequate and that the Act was void for vagueness. *Id.* at 36a-37a. Respondents simultaneously moved for a preliminary injunction.

Two weeks later, the parties stipulated to a temporary restraining order to remain in effect until the district court ruled on the motion. *Id.* at 37a. On April 4, 2005, more than a month after this case was filed, the Attorney General issued an opinion purporting to limit the scope of the Act to cover only one procedure, the intact variation of the dilation and evacuation procedure, and to craft adequate health and life exceptions. *Id.* at 54a-69a (Mich. Op. Att'y Gen. No. 7174 (2005)). Based solely on the Attorney General's opinion, the State moved to dismiss the case. *Id.* at 42a.

The district court, with the consent of the parties, consolidated the motion for preliminary and permanent relief, and heard arguments on that motion and the motion to dismiss.[1] *Id.* at 41a. On September 12, 2005, the district court issued a decision holding the Act unconstitutional because it created an undue burden on women seeking reproductive health care. The district court found that "[t]he Act . . . creates a ban on actions at the heart of abortion procedures from the earliest stages of pregnancy, whether used to perform induced abortions or to treat pregnancy loss." *Id.* at 43a-44a. In so holding, the district court rejected the State's argument that the Act could be limited to intact D&E: "A reading of the specific language of the Act

[1] The district court also heard a motion to intervene filed by an entity called Standing Together to Oppose Partial-birth-abortion ("STTOP"). The factual and procedural background related to STTOP's motion is detailed in Respondents' opposition to STTOP's petition for a writ of certiorari, *Standing Together to Oppose Partial-birth-abortion v. Northland Family Planning Clinic, Inc.*, No. 07-291.

supports Plaintiffs' arguments in that the Act would ban all pre-viable abortion procedures, including the suction curettage, D&E and induction methods of abortion." *Id.* at 44a. The district court also held that the Act's exceptions failed to protect women's health and their lives, and that the Act was unconstitutionally vague. *Id.* at 45a-49a. The district court implicitly denied the State's request to certify a question about the meaning of the Act to the Michigan Supreme Court.

The Sixth Circuit affirmed, agreeing with the district court that the Act created an undue burden by banning the most commonly used first- and second-trimester abortion procedures, including suction curettage and D&E.[2] *Id.* at 16a-17a. In so holding, the court rejected the State's attempt, proffered through the Attorney General's opinion, to narrow the statute to cover only intact D&Es. *Id.* at 17a-18a. The court held that the statute was not genuinely susceptible to such a construction, and that the State's argument to the contrary was "based on either a misunderstanding or an inaccurate description of the D&E procedure." *Id.* The Sixth Circuit also declined the State's request to certify a question about the Act's meaning to the Michigan

---

[2] The Sixth Circuit did not reach Respondents' claims that the Act's health and life exceptions were constitutionally inadequate. The court also found it unnecessary to reach Respondents' vagueness claim, which focused primarily on the health and life exceptions. For similar reasons, the Sixth Circuit found it unnecessary to address the Act's failure to define with specificity the procedures that it banned because the Sixth Circuit concluded that the Act bans a wide range of medically safe procedures under any plausible construction of the statute. *See* Section II, *infra*.

Supreme Court. Citing this Court's decisions in *Stenberg v. Carhart*, 530 U.S. 914 (2000), and *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997), the Sixth Circuit held that "the language of the statute here is not subject to a limiting construction," and therefore the "prerequisite for certification is not met." Pet. App. 29a.

REASONS FOR DENYING THE WRIT

The only question that the State has asked this Court to review is whether the lower courts should have certified a question about the meaning of the Act to the Michigan Supreme Court. That limited question does not warrant plenary review by this Court for at least three reasons. First, there is no dispute among the parties, or conflict in the lower courts, about the proper standard for determining whether to certify a question to a state supreme court. *See* Sup. Ct. R. 10(a). Second, the Sixth Circuit properly applied this Court's well-established standard for certifying a question: whether a state statute is reasonably susceptible of a narrowing construction. The Sixth Circuit held that the Act unambiguously applied to the most commonly used first- and second-trimester abortion methods, and therefore properly exercised its discretion in declining to certify a question to the Michigan Supreme Court. Third, this case does not present an important federal question because the procedures for and practical application of certification are entirely state-specific. *Id.* at 10(c). Accordingly, the petition for certiorari should be denied.

I. There Is No Conflict or Confusion in the Lower Courts About the Standard For Certifying Questions to State Supreme Courts.

This Court has made clear that the decision whether to certify a question to a state supreme court is discretionary, and that in exercising that discretion federal courts should consider whether the statute is susceptible to a narrowing construction. *See, e.g., Stenberg*, 530 U.S. at 945 (refusing to certify question about scope of Nebraska's "partial-birth abortion" statute because it was not fairly susceptible to narrowing construction); *City of Houston, Texas v. Hill*, 482 U.S. 451, 471 (1987) (refusing to certify a question about the meaning of an ordinance because it was "neither ambiguous nor obviously susceptible of a limiting construction"); *Lehman Bros. v. Schein*, 416 U.S. 386, 390-91 (1974) (the decision to resort to certification "rests in the sound discretion of the federal court").

That is the standard that the Sixth Circuit applied in this case.[3] Pet. App. 29a. It is also the standard that other federal circuits have routinely and consistently applied. *See, e.g., Union Planters Bank, N.A. v. New York*, 436 F.3d 1305, 1308 (11th Cir. 2006) (certification was appropriate where

---

[3] Moreover, this standard properly balances federalism, comity, and state sovereignty with the responsibility of the federal courts. *Cf. Kusper v. Pontikes*, 414 U.S. 51, 55 (1973) (where statute not susceptible of constitutional interpretation, *Pullman* abstention, the predecessor to certification, "would amount to shirking the solemn responsibility of the federal courts to guard, enforce, and protect every right granted or secured by the constitution of the United States") (internal quotation marks omitted).

statute was ambiguous); *Amer. Civil Liberties Union of Nevada v. Heller*, 378 F.3d 979, 986-87 (9th Cir. 2004) (certification is appropriate if statute is susceptible to a narrowing construction); *Planned Parenthood of Cent. N.J. v. Farmer*, 220 F.3d 127, 151-52 & n.12 (3d Cir. 2000) (noting that certification would be "fruitless" because, *inter alia*, the statute was not amenable to a narrowing construction); *Planned Parenthood, Sioux Falls Clinic v. Miller*, 63 F.3d 1452, 1463 (8th Cir. 1995) (certification is not necessary where the statute is neither ambiguous nor susceptible of a limiting construction); *Dorman v. Satti*, 862 F.2d 432, 435 (2d Cir. 1988) (certification is appropriate if the statute is readily susceptible to a narrowing construction); *Grant v. Meyer*, 828 F.2d 1446, 1448 n.5 (10th Cir. 1987) (certification is improper if the statute is unambiguous). *See generally* 17A Wright, Miller, Cooper and Amar, *Federal Practice and Procedure: Jurisdiction 3d* § 4248 (2007) (discussing history of federal certification and collecting cases).

In short, there is no conflict or confusion in the lower courts about the appropriate standard for certification.

II. The Sixth Circuit Properly Exercised Its Discretion in Declining Certification Based on Its Determination That the Act Is Not Reasonably Susceptible to a Narrowing Construction.

The Sixth Circuit properly followed this Court's precedents in determining the threshold question for certification: whether the Act is "'genuinely susceptible to two constructions.'" Pet.

App. 17a (quoting *Gonzales v. Carhart*, 127 S. Ct. 1610, 1631 (2007)). As this Court held in *Hill*, a statute is "not susceptible to a limiting construction" if "its language is plain and its meaning unambiguous." 482 U.S. at 468 (internal quotation marks and citations omitted); *see also Stenberg*, 530 U.S. at 945 ("statute must be 'genuinely susceptible' to two interpretations") (quoting *Almendarez-Torres v. United States*, 523 U.S. 224, 237-39 (1998)).[4]

Turning first to this Court's decisions in *Gonzales* and *Stenberg*, the Sixth Circuit compared the Act to the federal abortion ban this Court upheld, and the Nebraska ban it struck down. Pet. App. 16a-19a. The federal ban, the Sixth Circuit noted,

---

[4] The State's argument that federal courts should normally grant all requests for certification, Pet. Br. at 7-8, ignores this well-settled precedent, and such a blanket policy would inundate state supreme court dockets. Moreover, the cases relied upon by the State involve circumstances not present here. For example, in *Arizonans for Official English* this Court noted in *dicta* that the lower courts should have given greater "consideration" to the certification request because, *inter alia*, the course of the case was "complex," and there was a parallel case pending in the state courts. 520 U.S. at 79-80. In addition, *Fiore v. White*, 528 U.S. 23, 28-29 (1999), involved the clarification of a state court's previous construction of a state statute, and in *Elkins v. Moreno*, 435 U.S. 647, 662 n.16 (1978), the Court certified the interpretation of a single word – "domicile" – because it was germane to the operation of state government. Here, the State is seeking a construction of the Act that does not turn on the interpretation of a word or a phrase, but instead would require wholesale rewriting. *See infra* at 16-17. As this Court has held in declining to certify a question, "[a] federal court may not properly ask a state court if it would care in effect to rewrite a statute." *Hill*, 482 U.S. at 471.

applies only if a physician has delivered the fetus to *specified* "anatomical landmarks," which led the *Gonzales* Court to conclude that the federal ban applies only to intact D&E. *Id.* at 18a. The Act in this case has no such limitation. *Id.* Indeed, the Act is even broader than the ban struck down in *Stenberg*: that ban encompassed D&E procedures because it applied once a "substantial portion" of the fetus was through the cervix. *Id.* In contrast, the Act "applies when 'any anatomical part' of the fetus passes the vaginal introitus."[5] *Id.* The Sixth Circuit properly reasoned that if the ban in *Stenberg*

---

[5] There is a slight difference between the Nebraska ban's requirement that the fetus be brought into the vagina, and the Act's requirement that the embryo or fetus pass the vaginal opening. But the Sixth Circuit found this difference "insignificant" and noted that "Michigan does not argue to the contrary." Pet. App. 16a n.4. The Sixth Circuit based its conclusion on the evidence, which demonstrated that in a D&E procedure, the cervix is pulled "'towards the vaginal introitus, which shortens, if not eliminates, the distance between the cervix and the vaginal introitus.'" *Id.* at 16a-17a n.4 (quoting Decl. of Dr. Michael Hertz at 5). Indeed, regardless of the language of the ban considered in *Stenberg*, it is undisputed that during a D&E procedure a portion of the fetus is brought outside the vaginal opening. *See id.* at 6a ("The resistance caused by pulling the extracted portion of the fetus against the cervix causes the fetus to disjoin and die, after which the remaining parts are extracted."). Because "a portion of the fetus passes beyond the vaginal introitus" during a D&E, "this necessarily means [the Act] applies to D&E procedures." *Id.* at 16a-17a. This evidence is consistent with the description of abortion procedures in *Gonzales* and *Stenberg*. *Gonzales*, 127 S. Ct. at 1621 (in D&E procedure a fetal part is pulled "through the cervix and vagina" and a fetal part may be disjoined as "it is pulled through the cervix and out of the woman"); *Stenberg*, 530 U.S. at 925-26 (dismemberment in D&E occurs only after fetal part is pulled outside the cervix).

encompassed D&E abortions, the Act must as well because "whatever 'substantial part' means, it must require the removal of more than 'any anatomical part,' and both clearly fall short of the 'anatomical landmarks' of the federal ban."[6] *Id.* The Act's language is so broad, the Sixth Circuit found, that it also applied to first-trimester suction curettage and second-trimester induction procedures because in both procedures "signs of life identified in the statute . . . are often present after the fetus or embryo passes beyond the vaginal introitus." *Id.* at 18a-19a. The court therefore held that the Act is "easily the most sweeping and the most burdensome of the three" bans. *Id.* at 18a.

Accordingly, the Sixth Circuit rejected the State's argument, outlined in the Attorney General's opinion, that the Act can be read to apply only to the intact D&E procedure.[7] *Id.* at 17a-18a. The State

---

[6] In addition, the Act lacks many other characteristics that led this Court to uphold the federal ban in *Gonzales*. For example, this Court held that the federal ban's "intent requirements . . . limit its reach to those physicians who carry out the intact D&E." 127 S. Ct. at 1629. The Michigan Act contains no scienter requirements. In addition, unlike the Act, the federal ban contains a requirement that the physician perform an "'overt act, other than completion of delivery, that kills the partially delivered living fetus.'" *Id.* at 1627 (quoting 18 U.S.C. § 1531(b)(1)(B) (2000)). This Court noted that such a requirement "matters because, unlike intact D&E, standard D&E does not involve a delivery followed by a fatal act." *Id.* at 1631.

[7] The Sixth Circuit also held that the Attorney General's opinion could not moot the case because it did not bind courts or future Attorneys General. Pet. App. 21a. Moreover, contrary to the State's claim, Pet. Br. at 4, the extent to which the Attorney General can bind prosecutors is, at best, unclear, *see* Pet. App. 27a. In its petition, the State no longer argues that the

argued that a fetus in a D&E procedure will not become a perinate because that procedure requires the "'dismemberment or disarticulation of the fetus and removal of the dead fetus 'piece by piece' from the woman's uterus.'" *Id.* at 17a (quoting A.G. Op. at 9); Pet. Br. at 19. The Sixth Circuit held that the State's purported construction "is at odds with the language of the statute," which encompasses suction curettage, D&E, and inductions, and that the State's interpretation is "based on either a misunderstanding or an inaccurate description of the D&E procedure."[8] Pet. App. 17a-18a.

The court also rejected the State's legislative history argument because "given the unambiguous language of the statue . . . it [is] unnecessary to rely upon the legislative history here."[9] *Id.* at 20a. As

---

Attorney General's opinion moots the case. Rather, it merely suggests that it might provide a "template" for the Michigan Supreme Court if certification was granted. Pet. Br. at 12-13.

[8] Contrary to the State's argument, the Act nowhere requires the embryo or fetus to be "intact" to be a "perinate." Instead, the Act applies once any non-severed part passes outside the woman. As long as the "anatomical part" is non-severed when it passes outside the woman, the embryo or fetus becomes a "perinate." *See* Pet. App. 45a. Moreover, even if the word "intact" could be imported into the definition of "perinate," it would not limit the scope of the Act: the passage of a small part of an intact embryo or fetus is routine in the most common and safest procedures.

[9] Moreover, contrary to the State's claim that limiting the Act to intact D&Es is faithful to the statute's legislative history, *see* Pet. Br. at 25-29, there is evidence that the Legislature intended the Act to encompass far more. If the Legislature had intended to ban only intact D&E, it could have, for example, adopted Ohio's intact D&E ban previously upheld by the Sixth Circuit. *See infra* at 12 n.10. Even co-sponsors of the Act stated it would ban other procedures, including inductions. *See,*

this Court has held, "[t]here is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes." *United States v. Amer. Trucking Ass'ns*, 310 U.S. 534, 543 (1940). The Sixth Circuit noted that, as in *Stenberg*, "'[t]he relevant question is *not* whether the legislature wanted to ban D&X; it is whether the law was intended to apply *only* to D&X. The plain language covers both

---

e.g., Mich. Journal of the Senate 92-58 at 1065 (June 9, 2004) (Senate co-sponsor Birkholz stating that without the Act, "induced labor abortions" will "remain legal in Michigan"), available at http://www.legislature.mi.gov/(x50yexj4xx4x23u1d3inod45)/documents/2003-2004/Journal/Senate/pdf/2004-SJ-06-09-058.pdf.

Numerous legislators warned that the Act covered most abortion procedures and was therefore unconstitutional. *See, e.g.*, Mich. Journal of the Senate 92-40 at 475-76 (May 1, 2003) (Statements of Senators Jacobs and Schauer), available at http://www.legislature.mi.gov/(x50yexj4xx4x23u1d3inod45)/documents/2003-2004/ Journal/Senate/ pdf/2003-SJ-05-01-040.pdf.

In addition, the State's reliance on legislative and fiscal analyses is improper and misleading. *See* Pet. Br. at 26-27. Far from proving one side's claims, or demonstrating intent, those analyses simply paraphrase the viewpoints of legislators supporting and opposing the bill. *See, e.g.*, Senate Fiscal Agency Analysis for Enrolled Senate Bill 395 at 6 (the Act would "prohibit at least D&X *and D&E* abortion procedures") (emphasis added) (cited in Pet. Br. at 26), available at http://www.legislature.mi.gov/(S(f54hfm45sncr3oyz1fjqo4bt))/documents/2003-2004/billanalysis/Senate/pdf/2003-SFA-0395-E.pdf; *see also id.* at 8 (this analysis "does not constitute an official statement of legislative intent"); *Frank W. Lynch & Co. v. Flex Techs., Inc.*, 624 N.W.2d 180, 184 & n.7 (Mich. 2001) (such analyses are "a feeble indicator of legislative intent").

procedures.'"[10] Pet. App. 18a (quoting *Stenberg*, 530 U.S. at 939).

Notwithstanding the Sixth Circuit's fidelity to this Court's precedent, the State contends that the court abused its discretion in refusing to certify a question to the Michigan Supreme Court because that court would have "construed" the Act to render it constitutional. *See* Pet. Br. at 17. In fact, Michigan's cannons of statutory construction, which are virtually identical to those employed by the Sixth Circuit, would demand the same result the Sixth Circuit reached.[11] *See DiBenedetto v. W. Shore Hosp.*, 605 N.W.2d 300, 304 (Mich. 2000) (where statutory language is unambiguous Michigan courts "presume that the Legislature intended the meaning clearly expressed - no further judicial construction is required or permitted"). Moreover, contrary to the State's claim, the Michigan Supreme Court's decision in *People v. Bricker* did not establish unique statutory construction principles for abortion jurisprudence in Michigan. 208 N.W.2d 172, 176 (Mich. 1973) (decision "based upon a construction of

---

[10] The Sixth Circuit also recognized that the Michigan legislature "had significant guidance in implementing a statute that would ban only the D&X procedure" from this Court in *Stenberg* and from the Sixth Circuit's decision in *Women's Med. Prof'l Corp. v. Taft*, 353 F.3d 436 (6th Cir. 2003), which upheld Ohio's intact D&E ban. Pet. App. 22a. The Legislature nevertheless passed a "very broadly-worded statute that showed no meaningful attempt to comply with the constitutional limitations articulated by federal courts." *Id.*

[11] Furthermore, the Michigan Supreme Court rarely accepts certified question from federal courts, particularly where, as here, the underlying action involves a federal constitutional challenge to a state statute. *See* Section III, *infra*.

Michigan's statute guided by constitutional principles well recognized and applied in our state"). The *Bricker* court simply held that the pre-*Roe v. Wade* abortion ban could be applied to non-physicians consistent with legislative intent, especially because there was no question about the law's constitutionality when it was enacted.[12] *Id.* at 174-76. The same cannot be said of the Act. *See supra* at 12 n.10; *infra* at 14.

Moreover, contrary to the State's claim that the Sixth Circuit did not adhere to the principles of federalism and comity, the Sixth Circuit properly followed *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 330 (2006), in determining that rewriting the Act in the manner suggested by the State would invade the legislative domain. Although *Ayotte* involved the standard for fashioning an appropriate remedy after a finding of unconstitutionality – not the construction of a statute – the Sixth Circuit noted that both doctrines require fidelity to the text of the statute "lest the courts usurp the legislative function." Pet. App. 16a.[13] Similarly, courts are not in a position to

---

[12] The same is true in *People v. Adams*, cited by the State. 205 N.W.2d 415, 422 (Mich. 1973) (statute must be construed "to achieve the Legislature's intention") (cited in Pet. Br. at 17).

[13] The Sixth Circuit recognized that the State conflated the doctrine of constitutional avoidance, in which a narrowing construction is adopted, with the question of fashioning a remedy after a court has determined that a statute is unconstitutional. Pet. App. 15a. The only doctrine at issue in this petition is the former as it relates to certification – the State has not asked this Court to review the Sixth Circuit's undue burden holding or the remedy adopted by the Sixth Circuit upon finding the Act unconstitutional. *See* Pet. Br. at i, 6-7.

"rectify [a legislature's] dragnet approach to legislation" if a legislature passes a "very broadly-worded statute that show[s] no meaningful attempt to comply with . . . constitutional limitations." *Id.* at 22a. Indeed, as the Sixth Circuit observed, *Ayotte*'s warning to courts to "be wary of statutes that set an extremely wide net of prohibited conduct, and leave it to the courts to set the constitutional boundaries," was particularly "apropos here [because] the Michigan legislature appears to have cast a wide net that would prohibit virtually all methods of abortion once a fetal heart beat is detectable . . . despite knowing that some of these procedures were constitutionally protected." Pet. App. 19a. *Accord DiBenedetto*, 605 N.W.2d at 306 ("[W]e decline to rewrite the plain statutory language and substitute our own policy decisions for those already made by the legislature").

III. Whether the Sixth Circuit Abused Its Discretion By Refusing to Certify This Case to the State Supreme Court Does Not Raise an Important Federal Question.

This case does not present an important federal question because the mechanism for certifying a question to a state supreme court is grounded in state law. Some states do not even have a process for federal courts to certify questions to the state supreme court. *See, e.g.*, 17A Wright, Miller, Cooper and Amar, *Federal Practice and Procedure: Jurisdiction 3d* § 4248 (2007). Moreover, whether a state supreme court will, in practice, accept a certified question varies widely from state to state.

Although Michigan allows federal courts to certify questions to the Michigan Supreme Court, Mich. Ct. R. 7.305, that court rarely accepts such questions.[14] In *Knox v. Eli Lilly and Co.*, the Sixth Circuit expressed its frustration after the Michigan Supreme Court refused to answer a certified question:

> This is not the first time our questions have been rebuffed by the Michigan Supreme Court, and we must frankly conclude that the promise of the certification procedure . . . [is] illusory. . . . If our requests for assistance are to be denied . . . the certification procedure is worse than useless, as it only further delays the lethargic movement of civil cases through the courts.

592 F.2d 317, 319 (6th Cir. 1979); *see also* M. Bryan Schneider, *"But Answer Came There None": The Michigan Supreme Court and the Certified Question of State Law*, 41 Wayne L. Rev. 273, 315 (1995) ("The Michigan Supreme Court, to say the least, is not very

---

[14] Indeed, some Michigan Supreme Court justices believe that they lack the constitutional authority to accept certified questions from federal courts, which leads them to routinely refuse to accept questions. *See, e.g., In re Certified Questions (Melson v. Prime Ins. Syndicate)*, 696 N.W.2d 687, 687 (Mich. 2005) (Weaver, J., concurring); *id* at 687-92 (Young, J., concurring) ("[a]ny construction of Michigan law that we would have provided by answering the certified questions would have been merely 'advisory' because our decision would not have been binding" and such an advisory opinion is "beyond the 'judicial power' of this Court, and therefore, unconstitutional").

receptive to the certified question. . . . [T]he court refuse[s] to answer most questions").[15]

The Michigan Supreme Court is particularly reluctant to answer questions in the context of federal constitutional challenges, such as this case. For example, in *In re Certified Question (Jewell Theatre Corp.)*, 359 N.W.2d 513 (Mich. 1984), the Michigan Supreme Court refused to accept a question about the meaning of the phrase "open and indecent exposure" from a federal district court considering the constitutionality of an indecent exposure statute. The Michigan Supreme Court held that certification was not properly invoked, in part because the federal district court, "remarkably, but unequivocally, declared that the statute apparently [would] not pass constitutional muster . . . unless this Court responded to a certified question giving a 'saving construction'" to the statute. *Id.* at 515-16. The court also noted that the question was "a mere request for an advisory opinion . . . [about] federal constitutional law, thinly veiled behind a purported request" for advice on Michigan law. *Id.* at 516. The factors that led the Michigan Supreme Court to refuse to accept a certified question in *Jewell Theatre* apply with even more force here. First, the Sixth Circuit has *already* declared the Act unconstitutional – which the State has not appealed – and the certified question the State proposes would clearly ask the Michigan Supreme Court to "save" the Act from otherwise certain unconstitutionality. Second, the State's request is not proposed as a question

---

[15] The State thus errs in claiming that certification in this case would further "judicial economy." Pet. Br. at 8.

about a specific phrase or word in the Act, such as "open and indecent"; rather, the question is whether the Act may be replaced in its entirety with the Attorney General's opinion.

Accordingly, because the contours and practical application of the certification mechanism vary from state to state, this case does not present an important federal question.

CONCLUSION

For the foregoing reasons, the State's petition for a writ of certiorari should be denied.

Respectfully submitted,

BRIGITTE AMIRI
Counsel of Record
TALCOTT CAMP
LOUISE MELLING
ALEXA R. KOLBI-MOLINAS
STEVEN R. SHAPIRO
American Civil Liberties
Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2633

MICHAEL J. STEINBERG
KARY L. MOSS
American Civil Liberties Fund
of Michigan
60 West Hancock Street
Detroit, Michigan 48201
(313) 578-6814

Counsel for Individual Physicians

EVE C. GARTNER
ROGER EVANS
Planned Parenthood
Federation of America
434 West 33rd Street
New York, NY 10001
(212) 541-7800

Counsel for Planned Parenthood Mid-Michigan Alliance and Planned Parenthood of South Central Michigan

JANET CREPPS
Center for Reproductive Rights
120 Wall Street, 14th Floor
New York, New York 10005
(917) 637-3600

DAVID A. NACHT, P.C.
201 South Main, Suite 1000
Ann Arbor, Michigan 48104
(734) 663-7550

Counsel for Northland Clinics and Summit Medical Center, Inc.

November 7, 2007